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In the Supreme Court of the United States

OCTOBER TERM, 1960

No.

UNITED STATES OF AMERICA, PETITIONER

v.

DANIEL J. KOENIG

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit dismissing for lack of jurisdiction petitioner's appeal from that part of an order issued by the United States District Court for the Southern District of Florida which granted respondent's motion to suppress evidence.

OPINION BELOW

The opinion in the court of appeals (App., *infra*, pp. 13-26) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1961 (App., *infra*, p. 27). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an order suppressing evidence, entered subsequent to indictment on a motion made prior to indictment in a district other than that in which the indictment was returned and will be tried, is an appealable final order.

RULE INVOLVED

Rule 41(e), F. R. Crim. P.:

Motion for Return of Property and to Suppress Evidence.

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its

discretion may entertain the motion at the trial or hearing.

STATEMENT

Respondent was arrested by F.B.I. agents on September 29, 1959, in a rented house in Miami, Florida, which he occupied with his family (R. 60, 205, 283), and was charged with robbery on August 22, 1959, of a federally-insured bank in Yorkville, Ohio (R. 49, 65, 275-277). The arrest was based both upon a warrant of arrest issued in the Southern District of Ohio (later found to be based on an insufficient complaint) and information known to the arresting officers (later found to constitute probable cause). As an incident of the arrest, respondent's house was searched, and large sums of money, a .45 caliber Colt automatic pistol, and certain other items were seized (R. 75-77).

On October 9, 1959, a final hearing was held before the United States Commissioner of the Miami Division of the Southern District of Florida on the Ohio complaint, and on October 14, the commissioner recommended that a warrant of removal be issued (R. 9-11). On October 16, an indictment was returned against respondent in the District Court for the Southern District of Ohio (R. 17).

In the meantime, on October 12, respondent filed a "Motion to Suppress Evidence and Return Property" in the District Court for the Southern District of Florida (R. 2-6). On December 18, after three hearings on earlier dates (R. 43, 116, 267), the district court granted the motion to suppress but denied the motion for the return of property. The court made no findings of fact or conclusions of law, but found merely that

"the agents making the arrest without warrant had probable cause therefor but that the said search was unreasonable and in violation of the Fourth Amendment to the Constitution of the United States" (R. 37, 38).

On appeal by the government, the court of appeals dismissed the appeal for lack of jurisdiction (App., *infra*, p. 27). It rejected the government's contention that a motion to suppress brought prior to indictment in a district other than the one in which the indictment will be tried is an independent plenary proceeding, so that an order granting the motion is an appealable final order. It held instead that "[t]he crucial factor in deciding whether a suppression order is issued in an independent proceeding or is merely a step in the trial of a case, is the pendency of a criminal action in which the evidence sought to be suppressed may be used" (App., *infra*, p. 16); and that, if a criminal action is pending, "[o]rders suppressing evidence are then in the nature of a trial judge's rulings on admissibility of evidence" (App., *infra*, p. 18). The court then held, on the basis of its prior decision in *Zacarias* v. *United States*, 261 F. 2d 416 (C.A. 5), certiorari denied, 359 U.S. 935, that a criminal proceeding begins with the filing of a complaint and the holding of a commitment hearing, rather than with the filing of an indictment (App., *infra*, p. 19).

The court attached no significance to the fact that the order was entered in a district other than that in which the indictment was returned and to be tried. The statement by this Court in *Carroll* v. *United States*, 354 U.S. 394, 403, that "[e]arlier cases illustrated, sometimes without discussion, that under certain condi-

tions orders for the suppression or return of illegally seized property are appealable at once, as where the motion is made * * * in a *different district* from that in which the trial will occur * * *" was dismissed as "not essential to the disposition of the case." *Dier* v. *Banton*, 262 U.S. 147, which the Court in *Carroll* cited in support of this proposition, was rejected as "inapplicable" (App., *infra*, pp. 21-22, note 8).

The court of appeals also suggested that the suppression order lacked "finality" because it is not "binding" on the court that will try the indictment, but did not explicitly so hold. It said first that the effect to be given to the order of suppression is a matter essentially "within the sound discretion of a trial judge" (App., *infra*, p. 23). It then stated that, even if the order has a binding effect, "it is binding in the limited sense that Rule 41(e) represents an exception to the general rule that the trial court exercises exclusive control over the admission of evidence," and that the "trial judge having control over the conduct of a trial is not bound, if in the exercise of a sound discretion he should decide that exceptional circumstances require the admission of the evidence" (App., *infra*, pp. 24-25).

REASONS FOR GRANTING THE WRIT

The actual criminal proceeding, *i.e.*, the federal inquiry into whether a crime was committed, is pending only in the Southern District of Ohio. The motion to suppress was a civil matter[1] brought and heard in

[1] The order from which the appeal was taken was in a proceeding designated No. 1667-M-Misc. in the District Court for the Southern District of Florida, while the indictment is designated Criminal No. 7558 in the Southern District of Ohio. A motion to suppress

the District Court for the Southern District of Florida, a court which had no jurisdiction over the criminal proceeding and had power only to rule on the motion to suppress and the warrant of removal. Nevertheless, the court of appeals held that the order entered by the District Court for the Southern District of Florida was not properly appealable as a final order made in an independent proceeding.

This decision is in direct and irreconcilable conflict with the rulings of other circuits. Moreover, the issue of the appealability of the determination of motions to suppress made before indictment is important to the administration of criminal justice. We submit therefore that this is an appropriate case for review by this Court.

1. There is now before the Court for hearing next term the question whether an order on a motion to suppress, made after complaint but before indictment, and determined after the return of an indictment in the same district, is a final order in an independent proceeding, so that the denial of such a motion is appealable by the defendant. The Second Circuit has ruled that such an order is final in *DiBella* v. *United States*, 284 F. 2d 897, pending on writ of certiorari, No. 574, this Term: Accord, *Cheng Wai* v. *United States*, 125 F. 2d 915 (C.A. 2); cf. *Freeman* v. *United States*, 160 F. 2d 69 (C.A. 9); *United States* v. *Sinciro*, 190 F. 2d 397 (C.A. 3). On the other hand, the Fifth Circuit has ruled to the contrary in *Saba* v. *United States*, 282 F. 255 (C.A. 5), pending on petition for a writ of cer-

brought by respondent's co-defendant which was decided in the latter district was also designated Criminal No. 7558, since it was part of the criminal proceedings.

tiorari, No. 643, this Term,[2] and *Zacarias* v. *United States*, 261 F. 2d 416 (C.A. 5), certiorari denied, 359 U.S. 935.[3] Accord, *United States* v. *Williams*, 227 F. 2d 149 (C.A. 4); *Nelson* v. *United States*, 208 F. 2d 505, 516-517 (C.A. D.C.), certiorari denied, 346 U.S. 827. The government supports the position of the Fifth Circuit on this aspect of the case. If this Court, however, should hold that the Second Circuit was correct in *DiBella* and that an order on a motion made before indictment is final and appealable by a defendant, regardless of the later return of an indictment in the same district, it follows *a fortiori* that it was error for the court below to dismiss the appeal by the government in this case. For here, not only was the motion made before indictment, but the proceeding and the order were in a district other than the one in which the indictment was later returned.

2. Even if the Court should agree with the position of the Fifth Circuit in the *Saba* case (with which the government concurs), we think that the appealability of an order on a motion to suppress made in a district other than the district of trial is, in itself, an important question of criminal procedure on which there is a conflict which should be authoritatively settled by this Court.

a. The decision below seems contrary to the reasoning of this Court in *Carroll* v. *United States*, 354

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[2] In the *Saba* case, the motion was made before an information was filed instead of before indictment, but this difference is not relevant to the issue here.

[3] In *Zacarias*, the denial of a motion to suppress was held not to be appealable even though the motion was made and acted upon before indictment.

U.S. 394. When the Court held that a suppression order entered after indictment in the district of trial is not an appealable final order, it explicity noted that there were decisions to the effect that an order entered "in a *different district* from that in which trial will occur" is final and appealable. *Id.* at 403. This statement was made as part of a general discussion concerning the type of orders relating to a criminal case which "possess sufficient independence from the main course of the prosecution to warrant treatment as plenary orders, and thus be appealable * * *." An order in a different district was compared to an order in the district of trial to demonstrate that the former contains aspects of independence that the latter lacks. While the statement in the *Carroll* opinion may technically be dictum, it was dictum that had an important bearing on the holding.

The statement in *Carroll* was based on the earlier holding of this Court in *Dier* v. *Banton*, 262 U.S. 147, which the court below erroneously characterized as "inapplicable." *Dier* involved a motion brought in a federal court to enjoin a federal official from turning the petitioner's books and records over to a state district attorney for use in a state grand jury proceeding. While two different sovereignties were involved, that case is like this one in that it involved a motion brought in one jurisdiction to enjoin the use of evidence in another. Moreover, *Carroll* is not the only case in which this Court cited *Dier* as authority for the appealability of an order rendered in another district. In *Cogen* v. *United States*, 278 U.S. 221, 225, *Dier* was cited as an example of "[t]he independent char-

acter of the summary proceedings * * * even where the motion is filed in a criminal case * * * wherever the criminal proceeding contemplated or pending is in another court."

b. The decision below is also in conflict with decisions of two other circuits holding that determinations of motions to suppress made in a district other than that of indictment are appealable. In *United States* v. *Sineiro*, 190 F. 2d 397 (C.A. 3), after a complaint and arrest warrant had been issued in the District of Maryland, the movant was arrested in the Eastern District of Pennsylvania and taken before the Commissioner in that district. He was held to appear in Maryland on the basis of a statement previously taken from him, to which he unsuccessfully objected. He then filed a motion in the Eastern District of Pennsylvania to quash the warrant and suppress the statement, but the motion was denied. The Third Circuit held that the movant could appeal the order, both because it was rendered prior to indictment or information and because the criminal proceedings were brought in a different district from that in which the motion was made. See *id.* at 399.

In *United States* v. *Klapholz*, 230 F. 2d 494 (C.A. 2), certiorari denied, 351 U.S. 924, the defendants, subsequent to their indictment in the Eastern District of New York, filed motions in the Southern District of New York to suppress evidence seized at the time of their arrest. The motions sought the suppression of evidence because of the alleged invalidity of the search warrant and because of an unnecessary delay in arraigning the defendants in violation of Rule 5(a),

F.R. Crim. P. The district court rejected the attack on the warrant, but granted in part and denied in part the motions based on Rule 5(a). The defendants appealed, and the government cross-appealed from the partial grant of the motions under Rule 5(a). The court of appeals heard all the appeals on their merits, citing *Dier* v. *Banton* as authority for the proposition that a motion to suppress brought in a different district from the district of trial constituted an independent proceeding. See 230 F. 2d at 498.[4]

c. While the court below refrained from actually holding that an order to suppress in a different district is not binding on the trial court, that concept is stated in the opinion and provides the underlying basis for the decision. This assumption involves a matter of perhaps even greater significance in criminal procedure than the question of appealability.

The "binding" quality of a suppression order seems apparent from the face of Rule 41(e), F.R. Crim. P., which provides that, if the motion to suppress is granted, the property which has been seized "shall not be admissible in evidence *at any hearing or trial*" (emphasis added). The interdiction that the Rule establishes would appear to have force and effect in every district, and not just in the district where the order is issued. Cf. *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385; *Rea* v. *United States*, 350 U.S. 214; *United States* v. *Stephenson*, 223 F. 2d 336, 337 (C.A. D.C.); *Rodgers* v. *United States*, 158 F. Supp. 670, 680

[4] While the court's comment on *Dier* was made in regard to the motions under Rule 5(a), the same ruling applies to motions under Rule 41.

(S.D. Cal.), affirmed, 267 F. 2d 79 (C.A. 9).[5] If the order were not binding, there would be little purpose to the provision in Rule 41(e) allowing the motion to be brought in the district of seizure.

The only other opinion on this subject by a court of appeals, *United States* v. *Wheeler*, 256 F. 2d 745 (C.A. 3), certiorari denied, 358 U.S. 873, is basically contrary to the position of the court below (although the result is perhaps distinguishable on the ground that the successive orders were made by judges of the same court). There, a judge who had denied a motion to suppress assigned the petition for rehearing to another judge within the district, who issued a suppression order upon the basis of the same evidence heard by the first judge. The court of appeals reversed, holding that the decision of one judge can be reversed by another judge of coordinate jurisdiction only upon the basis of new evidence.[6]

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted. Since the questions involved are either directly related to or are in the area of the question of

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[5] *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793, 801-803, does not hold to the contrary. There, the particular facts of the case justified the holding that the suppression order was meant to apply only to the particular criminal action and did not preclude the use of the suppressed documents as evidence in subsequent civil actions.

[6] *Wheeler* was followed in *United States* v. *Brewer*, 24 F.R.D. 129 (N.D. Ga.), which held that a motion to suppress which was denied in the district of seizure could not be brought again in the district of trial.

appealability involved in *DiBella* v. *United States*, No. 574, this term, in which certiorari has been granted, it is respectfully suggested that this case be heard at the same time as the *DiBella* case.

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MAY 1961.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18355

UNITED STATES OF AMERICA, APPELLANT,

versus

DANIEL J. KOENIG, APPELLEE.

Appeal from the United States District Court for the Southern District of Florida.

(April 12, 1961.)

Before TUTTLE, Chief Judge, and RIVES and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: The scales of justice are not always evenly balanced; one of the scales holds a few extra weights in favor of a person accused of crime. This appeal deals with one of those weights: the limited jurisdiction of this Court to hear a government appeal from an order of a district court suppressing evidence.[1] For purposes of the appeal, two

[1] September 10, 1959, F.B.I. agents arrested Daniel J. Koenig in Miami, Florida, on a faulty arrest warrant and on probable cause based on a teletype communication from Ohio that a complaint had been filed against Koenig charging him with a bank robbery. After Koenig's arrest, agents searched the house he rented, his garage, and his automobile. They seized, among other things, an attache case containing $13,190, a 45 calibre blue steel Colt automatic, a masquerade make-up kit, a box containing forty coin-wrappers, two rolls of pennies with fifty pennies in each roll, and other articles including a black ceramic cat containing $340. October 9, 1959, the United States Commissioner at Miami held a final hearing on the Ohio complaint. October 12 Koenig filed a motion in the District Court for the Southern District of Florida, under Rule 41(e), Fed. R. Crim. P., for the suppression of the

elements in the case are important. (1) The defendant filed his motion to suppress before he was indicted, but after a complaint was issued against him and after a commitment hearing before the United States Commissioner. (2) The suppression order was issued in a district different from the district in which the defendant was indicted and will be tried. We hold that the order is not appealable. *Zacarias* v. *United States*, 5 Cir., 1958, 261 F.2d 416, cert. den. 359 U.S. 935, 79 S.Ct. 650, 3 L.Ed. 2d 637, controls our decision.

Government appeals in criminal cases are exceptional and are not favored by the courts. *Carroll* v. *United States*, 1957, 354 U.S. 394, 400, 77 S.Ct. 1332, 1 L.Ed. 2d 1442. Such appeals must be based on express statutory authority; the government had no right of appeal at common law. *United States* v. *Sanges*, 1892, 144 U.S. 310, 12 S.Ct. 609, 36 L.Ed. 445; *United States* v. *Janitz*, 3 Cir., 1947, 161 F.2d 19; *United States* v. *Rosenwasser*, 9 Cir., 1944, 145 F.2d 1015. See Orfield, Criminal Appeals in America, p. 58 (1939).

The primary statutory authority for government appeals in criminal cases, 18 U.S.C.A. 3731, does not specifically include appeals from orders suppressing

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seized property and for the return of the property. Two days later, the Commissioner filed his written findings and recommendation that a warrant of removal of Koenig be entered. October 16, four days after the motion to suppress was filed, an indictment was returned against Koenig in the Southern District of Ohio. December 18, 1959, after three hearings on earlier dates, the district court in Florida granted Koenig's motion to suppress the evidence and denied the motion for return of the property. The court held that the F.B.I. agents had probable cause to make the arrest without a warrant, but that the search was unreasonable and violative of the Fourteenth Amendment. The Government appeals from that order denying the motion to suppress; the defendant has not appealed from denial of the motion for return of the property. We do not discuss the reasonableness of the search and seizure, because of our holding that the order is not appealable.

evidence.[2] The Judicial Code, however, does authorize appeals from "all *final* decisions of the district courts . . . except where a direct review may be had in the Supreme Court." 28 U.S.C.A. § 1291. The appealability of an order suppressing evidence depends, therefore, upon whether it is "final".[3] Orders in an inciden-

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[2] "An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances: From a decision of judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section. From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section. The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted." 18 U.S.C.A. §3731.

[3] In criminal cases a final judgment or order may be reviewed by way of immediate appeal or writ of error, but absent special statutory authorization an interlocutory order cannot be so reviewed. See 6 Moore, Federal Practice, ¶54.11, 54.12, 54.14, 54.16; 2 Am.Jur., Appeal & Error, § 21. The final judgment as a basis for appeal is an historic concept, the modern rationale of which is to prevent congestion in the appellate courts. See Crick, The Final Judgment as a Basis for Appeal, 41 Yale L.J. 539 (1932). Crick suggests that upon analysis the "final judgment" rule causes as much labor as it saves, however, since it requires repeated litigation to determine what is and what is not a final judgment. Id. at 557-63. This case offers additional evidence to substantiate his thesis. Nevertheless the function of the rule is to avoid piecemeal litigation and the delays caused by interlocutory appeals. See 6 Moore, Federal Practice, ¶54.11; Lewis v. E. I. DuPont de Nemours & Co., 5 Cir., 1950, 183 F.2d 29. "Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations

tal ancillary proceeding to a criminal action are interlocutory and non-appealable; orders in independent plenary proceedings are final and appealable. *United States* v. *Wallace & Tiernan Co.*, 1949, 336 U.S. 793, 69 S.Ct. 824, 93 L.Ed. 1042; *Cogen* v. *United States*, 1929, 278 U.S. 221, 49 S.Ct. 118, 73 L.Ed. 275; *United States* v. *Ponder*, 4 Cir., 1956, 238 F.2d 825. See 6 Moore, Federal Practice, ¶ 54.14.

The crucial factor in deciding whether a suppression order is issued in an independent proceeding or is merely a step in the trial of a case, is the pendency of a criminal action in which the evidence sought to be suppressed may be used.[4] If there is no criminal proceeding pending, a motion for suppression of evidence and the return of such (evidential) property is an independent civil suit. But at what stage does a criminal proceeding begin? The courts of appeal have reached various answers.[5]

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of policy are especially compelling in the administration of criminal justice." Mr. Justice Frankfurter in Cobbledick v. United States, 1940, 309 U.S. 323, 325, 60 S.Ct. 540, 84 L.Ed. 783.

[4] As Judge Tuttle states the test in Zacarias v. United States, 5 Cir., 1958, 261 F.2d 416, 417, cert. den. 359 U.S. 935, the answer to the question whether an order to suppress evidence is final or interlocutory is found by determining whether the motion was made in "an independent civil proceeding, finally terminated with the order denying [or granting] the relief or is ancillary to a pending criminal proceeding." The time at which the motion was made, rather than the time as which it is passed upon by the court, controls in determining the character of the proceeding. Cogen v. United States, 278 U.S. 221, 49 S. Ct. 118, 73 L.Ed. 275; United States v. Poller, 2 Cir., 1930, 43 F.2d 911.

[5] *Second Circuit:* Cheng Wai v United States, 2 Cir., 1942, 125 F. 2d 915 (before indictment, order appealable); United States v. Poller, 2 Cir., 1930, 43 F.2d 911 (after proceedings before commissioner, but before indictment; order appealable).

Third Circuit: United States v. Wheeler, 3 Cir., 1958, 256 F.2d 745, cert. den. 358 U.S. 873 (after indictment, order appealable; United States v. Pack, 3 Cir., 1957, 247 F.2d 168 (after indictment and dismissal, order not appealable); United States v. Bianco, 3

The filing of an information or an indictment is frequently accepted as the dividing-line to mark the beginning of criminal proceedings. See Orfield, Criminal Procedure from Arrest to Appeal, pp. 204-208 (1947). The difficulty here is that at the time Koenig

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Cir., 1951, 189 F.2d 716 (before indictment, order appealable); United States v. Jantz, 3 Cir., 1947, 161 F.2d 19 (after indictment, order not appealable); Re Sana Laboratories, Inc., 3 Cir., 1940, 115 F.2d 717, cert. den. sub. nom. Sana Laboratories, Inc. v. United States, 1941, 312 U.S. 688 (after indictment, order appealable).

Fourth Circuit: United States v. Ponder, 4 Cir., 1956, 238 F.2d 825, noted in 35 No. Car. L. Rev. 501 (1957) (after indictment, order appealable); United States v. Williams, 4 Cir., 1955, 227 F.2d 149 (before indictment, order not appealable).

Fifth Circuit: Zacarias v. United States, 5 Cir., 1958, 261 F.2d 416, cert. den. 359 U.S. 935 (before indictment, order not appealable); United States v. Ashby, 5 Cir., 1957, 245 F.2d 684 (after indictment and dismissal, order appealable); Davis v. United States, 5 Cir., 1943, 138 F.2d 406 (hearing before Grand Jury, order appealable); Turner v. Camp, 5 Cir., 1941, 123 F.2d 840 (summary proceeding against prosecuting officer, order appealable).

Sixth Circuit: Dowling v. Collins, 6 Cir., 1926, 10 F. 2d 62 (criminal case pending, order nevertheless appealable).

Seventh Circuit: United States v. One Plymouth Sedan Automobile, 7 Cir., 1948, 169 F.2d 3 (after indictment, order not appealable).

Ninth Circuit: United States v Sugden, 9 Cir., 1955, 226 F.2d 281, aff'd mem., 1956, 351 U.S. 916 (after indictment and dismissal, order appealable); Weldon v. United States, 9 Cir., 1952, 196 F.2d 874 (before indictment or information, after complaint, arrest, and arraignment; if order effective, appealable); Freeman v. United States, 9 Cir., 1946, 160 F.2d 69 (after complaint and hearing before Commissioner, but before indictment, order appealable); United States v. Rosenwasser, 9 Cir., 1944, 145 F.2d 1015 (after first trial, before new trial, order not appealable).

District of Columbia Circuit: United States v. Stephenson, D.C. Cir., 1955, 223 F.2d 336 (after indictment, order not appealable); Nelson v. United States, D.C. Cir., 1953, 208 F.2d 505, cert. den. 346 U.S. 827 (before indictment, order not appealable); United States v. Cefarvatti, D.C. Cir., 1952, 202 F.2d 13, noted in 21 Geo. Wash. L. Rev. 631, 39 Va. L. Rev. 103, 41 Geo. L. J. 259 (after indictment, order appealable). See Friedenthal, Government Appeals in Federal Criminal Cases, 12 Stan. L. Rev. 71, 83-102 (1959); note, 106 U. Pa. L. Rev. 612 (1958).

filed his motion, there was no way of knowing positively that he would be indicted. In *Post* v. *United States*, 1894, 161 U.S. 583, 587, 16 S.Ct. 611, 40 L.Ed. 816, (not, however, involving a motion to suppress) the Supreme Court said:

> "Criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made against the accused, either by indictment presented or information filed in court, or, at the least, by complaint before a magistrate. [citations omitted]. The submission of a bill of indictment by the attorney for the government to the grand jury, and the examination of witnesses before them, are both in secret, and are no part of the criminal proceedings against the accused, but are merely to assist the grand jury in determining whether such proceedings shall be commended; the grand jury may ignore the bill, and decline to find any indictment; and it cannot be known whether any proceedings will be instituted against the accused until an indictment against him is presented in open court."

When the motion to suppress is made *after* indictment the order is considered interlocutory and neither the defendant nor the government may appeal from it, because the question whether the accused would be indicted has been resolved and motions related to the suppression of evidence are integrally related to the criminal proceeding. *Carroll* v. *United States*, 1957, 354 U.S. 394, 77 S.Ct. 1332, 1 L.Ed. 2d 1442 (government's right to appeal); *Cogen* v. *United States*, 1929, 278 U.S. 221, 49 S.Ct. 118, 73 L.Ed. 275 (defendant's right to appeal). Orders suppressing evidence are then in the nature of a trial judge's rulings on admissibility of evidence. Even when the motion results in dismissal

of the indictment for lack of evidence, the order is not final and hence not appealable. *Carroll* v. *United States*, 1957, 354 U.S. 394, 77 S.Ct. 1332, 1 L.Ed. 2d 1442. But where the motion is made by the applicant *before* an information or indictment is found or returned against him, some courts—and we recognize the force of their arguments—treat the proceeding as independent and the resulting order final and appealable. *Go-Bart Importing Co.* v. *United States*, 1931, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 344; *Burdeau* v. *McDowell*, 1920, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048; *Perlman* v. *United States*, 1918, 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950; *Davis* v. *United States*, 5 Cir., 1943, 138 F.2d 406; *Cheng Wai* v. *United States*, 2 Cir., 1942, 125 F.2d 915.

This Court has drawn the line at a stage earlier than indictment. *Zacarias* v. *United States*, 5 Cir., 1958, 261 F.2d 416, cert. den. 359 U.S. 935, 79 S.Ct. 650, 3 L.Ed. 2d 637.[6] This Court treats an indictment, once made, as relating back, at least to the extent that when an indictment has been returned, an order to suppress, following on the heels of a complaint and a commitment hearing, is treated as one step in a series of steps constituting the criminal proceeding. In Zacarias the defendant's motion to suppress was filed and denied before indictment.[6] A complaint had been issued by a United States Commissioner, a commitment hearing had been held, and Zacarias was already bound over to the district court. This Court refused to allow an appeal by the defendant, on the ground that the order denying his motion was interlocutory. Koenig is in no different situation from Zacarias. Here, a

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[6] See also Saba v. United States, 5 Cir., 1960, 282 F.2d 255, and Peterson v. United States, 5 Cir., 1958, 260 F.2d 265, in which cases, however, the motion to suppress was filed after indictment. See United States v. Williams, 4 Cir., 1955, 227 F.2d 149, cited with approval in Zacarias.

complaint and a warrant had been issued, the Commissioner had held a full preliminary hearing, the Commissioner had announced oral findings recommending that Koenig be removed to the district court in the Southern District of Ohio, and the district court reached its decision on suppressing the evidence four months after Koenig had been under indictment. In the light of Zacarias, Koenig's motion to suppress was not an independent action but simply an early step in the criminal case against him.[7]

The fact that the motion for the return of property was denied, while the motion to suppress was granted, so that the property remains in the possession of the court, adds some weight to the view that the order appealed from is interlocutory. Cf. *United States* v. *Rosenwasser,* 9 Cir., 1944, 145 F.2d 1015, 1017; *Carroll* v. *United States, supra* at p. 404, n. 17.

The Government seeks to distinguish Zacarias on the ground that the Zacarias appeal was from an order *denying* a defendant's motion to suppress evidence; here, the appeal is from an order *granting* the motion. When there is a denial of the motion, the defendant still may object to the evidence when it is introduced in the trial and may appeal from a verdict against him. If, on the other hand, the motion to suppress is granted, the government cannot introduce the evidence, cannot appeal if it loses the case, and may be forever deprived of questioning the validity of the order. But on this

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[7] "However, we think it quite plain that after a complaint has been issued by a United States Commissioner, the accused has been afforded a commitment hearing at which he is permitted to cross examine the prosecuting witnesses and to testify, if he so desires, in his own behalf, and is then, in the language of the statute '[held] to answer in the district court,' a motion thereafter made under Rule 41(e) is incidental to the criminal proceeding already commenced and pending. An order on such motion is not final; it is interlocutory and is not appealable." Zacarias v. United States, 5 Cir., 1958, 261 F.2d 416, 418.

score, the position of the government is no worse than in the usual case of an adverse ruling on a point of evidence during a criminal trial. There too the government would have no right of appeal. See *United States* v. *Rosenwasser*, 9 Cir. 1944, 245 F.2d 1015. There may be a difference between the grant and denial of a motion that works to the disadvantage of the government, but the effect of the difference cannot change the form and character of a motion as interlocutory or as final. *Carroll* v. *United States*, 1957, 354 U.S. 394, 404-406, 77 S.Ct. 1332, 1 L.Ed. 2d 1442. This difference between granting and denying a suppression order does point up the imbalance in the scales of justice, but it is up to Congress to make the correction. See Kronenberg, The Right of a State to Appeal in Criminal Cases, 49 J. Crim. L., C. & P.S. 473 (1959); Comment, The Right of State Appeal in Criminal Cases, 9 Rutgers L. Rev. 545 (1955); Orfield, Criminal Appeals in America, pp. 61-64 (1939).

The United States argues that the issuance of the order by a court in a different district from that in which the trial will occur takes the case out of the general rule and beyond the reach of Zacarias.[8] Rule

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[8] In Carroll v. United States, 1957, 354 U.S. 394, 403, 77 S.Ct. 332, 1 L.Ed. 2d 1442, the Supreme Court stated: "Earlier cases illustrated, sometimes without discussion, that under certain conditions, orders for the suppression or return of illegally seized property are appealable at once, as where the motion is made prior to indictment, or in a different district from that in which the trial will occur. . . ." Carroll dealt with the appealability of an order granting a motion to suppress made *after indictment, and in the district of trial*. Thus the language quoted above was not essential to the disposition of the case. To support the statement, the Court cited, in a footnote, only the case of Dier v. Banton, 262 U.S. 147, 67 L.Ed. 915, 43 S.Ct. 533. In the Dier case the motion was made in federal court, but the criminal proceedings, if any, were to be brought in state court. The Receiver of the assets of an alleged bankrupt had in his possession the books and records of the bankrupt. Dier, the bankrupt, sought an injunction to prevent the

41(e), Fed. R. Crim. P. provides:

> "A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained . . . . The motion to suppress evidence may also be made in the district where the trial is to be had."

There is nothing in this rule leading to the conclusion that if an order of suppression is rendered in the district of seizure it is necessarily "binding" in the district of trial, as the Government contends. Rule 41(e) says nothing about the government's rights. Rule 41(e) may even be read to mean that the defendant has two bites at the apple, once in the district of seizure and once "also" in the district of trial. If Rule 41(e) is read as allowing a single hearing, rather than multiple hearings, there is still no language in the rule requiring that a suppression order be regarded as "final".

When we get down to the bare bones of the argument, we find the government contending that in the same district or circuit a pre-trial suppression order "binds" the trial judge and, a fortiori, the pre-trial suppression order of a district judge in Florida "binds" the district judge in Ohio charged with trying Koenig; therefore, the order is final, and appealable. It is cer-

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Receiver from turning over these books and records to the District Attorney of New York County for use in a state grand jury proceeding on the ground that this would violate his constitutional privilege against self-incrimination. The lower court denied the motion. The Supreme Court heard the appeal without discussion of the issue of appealability. For several reasons, we consider the Dier case inapplicable to the instant case: the appeal was not by the government; the matter related only tangentially to a criminal case; and the motion possessed "sufficient independence from the main course of the prosecution to warrant treatment as [a] plenary order. . . ." Carroll v. United States, *supra* at 403.

tainly proper that, generally, one judge, in coordinate jurisdiction with another judge, should not overrule that other.[9] But, as we read the cases, this matter is essentially one within the sound discretion of a trial judge conducting his court in the interest of furthering the administration of justice.[10]

In this Circuit, in *United States* v. *Brewer*, 24 F.R.D.

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[9] "In federal practice, judges of coordinate jurisdiction, sitting in cases involving identical legal questions under the same facts and circumstances, should not reconsider the decisions of each other." Prack v. Weissenger, 4 Cir., 1960, 276 F.2d 446. See also Two Guys from Harrison-Allentown, Inc. v. McGinley, 3 Cir., 1959, 266 F.2d 427.

[10] The courts are in disagreement as to whether a ruling on a pre-trial motion to suppress is binding on the trial court. In United States v. Wheeler, 3 Cir., 1958, 256 F.2d 745, one district judge had denied a pre-trial suppression order, and a second judge, taking new testimony, had granted the order. The Court of Appeals held that it was a proper exercise of discretion to take new testimony, but an abuse of discretion to grant the order where the testimony was essentially the same as at the original hearing. The decision was based on the third circuit rule that "judges of coordinate jurisdiction sitting in the same court and in the same case should not overrule the decisions of each other" (TCF Films v. Gourley, 3 Cir., 1957, 240 F.2d 711, 713). The rule is "designed to prevent shopping about by the defeated party for a judge more favorably disposed to whom a petition for reconsideration may be presented." United States v. Wheeler, 3 Cir., 1958, 256 F.2d 745, 748. The second Circuit took the opposite view in Dictograph v. Sonotone, 2 Cir., 1956, 230 F.2d 131 (not however involving Rule 41(e)): "[J]udicial sensibilities should play no part in suitors' rights." But see United States v. Klapholz, 2 Cir., 1956, 230 F.2d 494. In Waldron v. United States, D.C. Cir., 1955, 219 F.2d 37, 41, the court held: "It seems clear to us that a ruling on a motion to suppress evidence becomes a controlling rule in the case just as does a ruling made during the trial." Citing Waldron in a case where a motion to suppress was denied before trial and renewed at trial, Judge Holtzoff held that "a ruling denying a motion to suppress made before the trial under Rule 41(e) . . . becomes the law of the case and is binding on the trial court". United States v. Jennings, 1956, 19 F.R.D. 311, aff'd 247 F.2d 784. But see United States v. Jackson, 1957, 149 F. Supp. 937, rev'd on other ground, 250 F.2d 772.

129 (N.D.Ga., 1959), the District Court for the Northern District of Georgia held that the defendants could not bring motions to suppress evidence in the district of trial when the motions had been brought and denied in the district of seizure, the Middle District of Georgia. The Court stated that Rule 41(e) "is intended to provide for a hearing in either district, but does not require multiple hearings"; that "in the absence of exceptional circumstances" the ruling in the district of seizure is controlling. In *United States* v. *Lester*, 21 F.R.D. 30 (S.D.N.Y. 1957) the district court in New York held that a defendant, moving for suppression of evidence could not, as a matter of right, invoke the jurisdiction of the court of seizure. The court declined jurisdiction, leaving the defendant free to move for suppression in the district court of trial in Pennsylvania. "Such a course", the Second Circuit pointed out in *United States* v. *Klapholz*, 1956, 230 F.2d 494, 497, "would have avoided invasion of the trial court's normal province to pass on the admissibility of evidence without jeopardy to the right of the defendants to the exclusion of evidence under the McNabb rule." In Klapholz the motion to suppress was based on Rule 5(a), Fed. R. Crim. P. There is no doubt, however, that a federal court has jurisdiction to entertain a motion to suppress evidence obtained within the district, even though the offenses were committed in another district, and violated state law, not federal law. *Rea* v. *United States*, 1955, 350 U.S. 214, 76 S.Ct. 292, 100 L.Ed. 233.

Assuming, but without deciding, that the order of the court in the district of seizure is "binding", it is binding in the limited sense that Rule 41(e) represents an exception to the general rule that the trial court exercises exclusive control over the admission of evi-

dence. The parties are bound, as they are to any rule of the case, subject to further orders of the Court. The trial judge having control over the conduct of a trial is not bound, if in the exercise of a sound discretion he should decide that exceptional circumstances require the admission of the evidence. Certainly, the order is not binding in the sense that it can transform an otherwise interlocutory order into a final order. And, an order to suppress has no finality because it does not of itself terminate the criminal proceedings.[11]

The Government's real objection here is that it will not have another opportunity to obtain review. That would be so even if the order were made by a district judge in the district of trial. *United States* v. *Wheeler*, 3 Cir., 1960, 275 F.2d 94; *United States* v. *Jennings*, (D.C.D.C. 1956) 19 F.R.D. 311, aff'd, D.C. Cir., 1957, 247 F.2d 784. Carroll answers this argument:

> "Many interlocutory decisions of a trial court may be of grave importance to a litigant, yet are not amenable to appeal at the time entered, and some are never satisfactorily reviewable. In particular is this true of the Government in a criminal case. . . ."

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[11] In United States v. Ashby, 5 Cir., 1957, 247 F.2d 684, an order to suppress evidence effectually terminated the proceeding since the district court considered the indictment invalid as based on tainted evidence. This Court allowed an appeal in the course of which it was necessary to review the suppression order inseparably connected with the dismissal. But the appeal was from the dismissal of the indictment. In a similar case, United States v. Wheeler, 3 Cir., 1958, 256 F.2d 745, cert. den. 358 U.S. 873, the court stated that it was not allowing a roundabout appeal from a nonreviewable interlocutory order. The question of the validity of the indictment obtained as a result of presentation to the grand jury of evidence unlawfully acquired would not necessarily entail consideration of the different question of whether the evidence involved was subject to a suppression order.

If the Government is to be given an opportunity to appeal a suppression order in criminal cases, Congress should give it.[12]

This Court has no jurisdiction to hear the appeal from the order of suppression. The appeal is accordingly

DISMISSED.

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[12] "If there is serious need for appeals by the Government from suppression orders, or unfairness to the interests of effective criminal law enforcement in the distinctions we have referred to, it is the function of the Congress to decide whether to initiate a departure from the historical pattern of restricted appellate jurisdiction in criminal cases." Carroll v. United States, 1957, 354 U.S. 394, 407, 77 S.Ct. 1332, 1 L.Ed. 2d 1442.

In 1956 Congress took the affirmative step of allowing the Government to appeal pre-trial suppression orders in narcotics cases; in such cases a large part of the Government's evidence is obtained by seizure after arrest. 18 U.S.C.A. §1404 (1958). A recent "Report of the Committee on the Judiciary, United States Senate, containing a Summary of the Findings and Recommendations of the Subcommittee on Improvements in the Federal Criminal Code" (S.R. Rep. No. 1478, 85 Cong., 2nd Sess., at p. 14) stated: "[S]uch appellate rights should not be restricted solely to narcotics cases. With stringent Federal rules governing searches and seizures, the absence of a statutory right of the Government to appeal from preliminary orders suppressing the evidence in other criminal cases is a serious handicap to Federal law enforcement authorities. . . . Ironically, the ultimate question of whether the district judge was right initially in suppressing the evidence cannot be determined, because the Government lacks the right to appeal this preliminary ruling. . . . It is obvious that with 94 United States district courts, with 330 district judges, each having its own views as to what constitutes an illegal search, there never will be achieved any degree of uniformity in the Federal law until the Government is granted the right to appeal. Even judges within the same district are not in agreement as to what constitutes an unreasonable search. Where a search will be approved by one, it will be suppressed by another."

JUDGMENT

Extract from the Minutes of April 12, 1961

No. 18355

UNITED STATES OF AMERICA,

versus

DANIEL J. KOENIG

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal in this cause be, and the same is hereby dismissed.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961 594597 1966